In The

Supreme Court of the United States

October Term, 1965

No. 531

COMMONWEALTH OF PENNSYLVANIA

vs.

FRANK JOSEPH BURNS,

Petitioner

Petition for a Writ of Certiorari to
~~*The United States Court of Appeals*~~
For the Third Circuit
the Supreme Court of Pennsylvania

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REASONS FOR GRANTING THE WRIT

1. The issue here is one of first impression. It is important that your Honorable Court resolve the issue whether the Pa. Statute, Section 822 of the Act of June 24, 1939, P. L. 872, 18 P.S. 4822, is unconstitutional in that it violates the Due Process Clause of the 14th Amendment for its vagueness in describing what persons are within the scope of the Act.
2. Whether the Admission into evidence of your petitions financed transactions constituted a denial of due process of law in that such evidence bore no competency nor relevancy nor materiality to the issues involved but only served to prejudice the rights of your petitioners as to receiving a fair trial.

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COMMONWEALTH OF PENNSYLVANIA

vs.

FRANK JOSEPH BURNS,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO ~~THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT~~ The Supreme Court of Pennsylvania

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania dismissing petitioner's appeal from a final order and judgment of the Court of Quarter Sessions of Cambria County, Pennsylvania, in that the Pennsylvania Statute 18 P. S. 4822 is unconstitutional.

OPINIONS BELOW

The Opinion of the Superior Court of Pennsylvania is officially reported and appears hereinafter as Appendix A. The Supreme Court of Pennsylvania filed no opinion but merely refused to hear the appeal of your petitioner.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3) and Rule 22 (1). The final order and judgment of the Supreme Court of Pennsylvania denying allowance of an appeal in Commonwealth of Pennsylvania vs. Frank Joseph Burns was rendered on July 18, 1962.

QUESTION PRESENTED

Whether the petitioner's conviction under the Pennsylvania Statute, Section 822 of the Act of June 24, 1939, P. L. 872, 18 P. S. 4822, was a violation of the Due Process Clause of the 14th Amendment in that your petitioner was not charged by law with the collection, safekeeping, etc. of public money as required by the act?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

1. United States Constitution, Amendment XIV: * * * that "nor shall any state deprive any person of life, liberty or property without due process of law."

2. 28 U. S. C. § 1257 (3) provides:
"1257(3) STATE COURTS, APPEAL, CERTIORARI. Final judgments or decrees rendered by the highest state court of a state in which a decision could be had may be reviewed by the Supreme Court * * * by writ of certiorari where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

STATEMENT OF THE CASE

The petitioner was prosecuted for embezzlement by a public officer under Section 822 of the Penal Code of 1939. Thirteen indictments were tried before Honorable George W. Griffith, P.J. and a jury in the Court of Quarter Sessions of Cambria County, Pennsylvania. Your petitioner was found guilty on all counts in the indictments. After the verdict, the petitioner moved for a new trial and arrest of judgment which was refused by the Court of Quarter Sessions of Cambria County on October 23, 1961.

On November 7, 1961, your petitioner appealed to the Superior Court of Pennsylvania at Nos. 26 to 38 inc. April Term, 1962. On June 12, 1962, the Superior Court in an Opinion written by Judge Ervin affirmed the judgment of the Court of Quarter Sessions of Cambria County. A Petition for Rehearing was filed in the Superior Court of Pennsylvania on behalf of your petitioner which petition was denied.

A Petition for Allowance of Appeal was submitted to the Supreme Court of Pennsylvania, Western District, at No. 2431A Miscellaneous Docket, 1962. The Supreme Court on July 18, 1962 denied your petitioner's Petition for Allowance of Appeal.

The facts of the case are briefly as follows: The petitioner, Frank J. Burns, 67 years of age, during the years 1957, 1958 and 1959 was the Superintendent of the Cambria County Home, Ebensburg, Pennsylvania, and his wife was a matron at said institution. The Superintendent had great discretion and it was left up to him how to operate the County Home. He and his wife were furnished a house rent free, an automobile and their maintenance.

Mr. Burns, as Superintendent, arranged with certain of the patients at the institution to pay a certain amount for said patients' maintenance on a monthly basis. He withheld the amounts charged in the thirteen indictments,

and did not turn same over to the County Treasurer. He used the amounts withheld to pay by cash or check, bills for the benefit of the patients and for services and goods which were bought for and delivered to the County Home. Other goods were purchased for the Home in regular course by requisition through the County Commissioners' Office. The petitioner admitted that he had withheld the amounts set forth in the indictments but because of convenience and expediency; and because he thought he had the right, he used this money, after mingling some of same in his own bank account for the payment of legitimate bills and for the use of the patients at the County Home. Petitioner made payments in cash and received receipted bills; also paid by check County bills. Petitioner produced cancelled checks, receipted bills and disinterested merchant witnesses as to payment and furnishing of merchandise and services. The amount of embezzlement charged in the thirteen indictments was $6,170.00 in the three year period; it is undisputed that he spent $24,035.74 during that period on behalf of the County from the funds which he withheld. Petitioner denied that he had embezzled or converted any of said money.

The petitioner admitted that his method of payment was irregular and not authentic but he thought he had the right in conducting the County Home, for expedience sake and personal reasons, to make said expenditures on behalf of the County.

The petitioner was sentenced on each count to make restitution and to undergo imprisonment in the County Prison for a period of not less than three years nor more than ten years.

1. The issue here is one of first impression. It is important that your Honorable Court resolve the issue whether the Pennsylvania Statute, Section 822 of the Act of June 24, 1939, P. L. 872, 18 P. S. 4822, is unconstitutional in that it violates the Due Process Clause of

the 14th Amendment for its vagueness in describing what persons are within the scope of the Act.

It is the contention of your petitioner that Section 822 of the Act of June 24, 1939, P. L. 872, 18 P. S. 4822, which states:

> "Whoever, being an officer, employee or agent of this Commonwealth or political subdivision thereof, *charged with* the collection, safekeeping, transfer or disbursement of public money, converts to his own use, in any way whatsoever * * *"
> (Underscoring ours)

is unconstitutional in that it fails to describe what persons are *charged with* the collection, safekeeping, transfer or disbursement of public money. Your petitioner contended before the Supreme Court of Pennsylvania that he was not within the class of persons that can violate Section 822 of the penal code, in that the words "charged with" appearing in the above referred to statute means an officer, employee etc. who is *charged by law* with the collection etc. of public money and your petitioner has never been so charged. (Underscoring ours)

The rule is stated in *U. S. A. vs. Eastern Air Lines, Inc.*, 192 Fed. Supp. 187, 1961,

> "If the acts proscribed are couched in language which is vague, uncertain, indefinite or ambiguous, so that men of common intelligence must necessarily guess at its meaning or differ as to its application, the enactment is invalid as a deprivation of due process of law."

Your Honorable Court in *Winters vs. People of State of New York*, 68 S. Ct. Rep. 665, 1948, held that the vice of uncertainty in a state statute violates the due process clause of the 14th Amendment of the Constitution of the United States. Your Honorable Court therein stated:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending

primarily upon civil sanction for enforcement. The crime must be defined with appropriate definiteness.

"There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from *uncertainty in regard to persons within the scope of the act.* * * *" (Underscoring ours) See also *Lamzetta vs. State of New Jersey*, 59 S. Ct. Rep. 618, 1939.

The words "charged with" as used in the Pennsylvania Statute fixes no ascertainable standard of description to enable a court to determine whether an accused be deemed guilty of the offenses alleged. It has been cited by your petitioner in his briefs in the state courts that the following decisions in the Supreme Courts of other states have held that the term *"charged with"* in a penal statute of this nature means charged by law. Thus if the legislature of Pennsylvania in enacting the referred to statute means that the phrase *charged with* should have another meaning than the meaning which has been attributed to it by the Supreme Court of other states, such a meaning should have been unequivocally spelled out and not left to the conjecture of the Pennsylvania Courts for to do this is to deny a person of his assured liberty as guaranteed under the Constitution of the United States.

The position that has been taken by your petitioner in the state courts and which is also the position which he presents to your Honorable Court is that the Pennsylvania statute heretofore referred to is unconstitutional as a result of the vice of vagueness in that it fails to describe what persons are charged with the collection, safekeeping etc. of public money and secondly, your petitioner would also be denied of his constitutional rights in being tried under a statute which is not applicable to him, that is that the words "charged with" under the referred to statute means charged by law; and that the petitioner as the Superintendent of the County Home was never charged

by law with the collection, safekeeping etc. of public money. That only the County Treasurer can receive county institutional district money and that such County Treasurer as the treasurer of the institutional district is the only one charged by law with the collection and disbursement of the public funds.

It is without question that your petitioner is not within the class of persons that can violate 18 P.S. 4822 and therefore any conviction under this statute is a violation of due process.

Your Honorable Court held in *Sorrells vs. U. S.*, 287 U. S. 435, that statutes should not be literally interpreted at the expense of the reason of the law, so as to produce flagrant injustics. To attribute any other definition to the words "charged with" as defined by the heretofore cited state opinion, would not only work an injustice upon your petitioner but would result in such an absurd construction of the Pennsylvania statute that your petitioner would be convicted under a statute which has no application to him. The Supreme Courts of Idaho, Ohio, Nebraska and California in interpreting the words charged with as set forth in the language of their statutes, which language is the exact replica of the Pennsylvania statute here in question, have held these words to mean charged by law. It now is a question of great importance which your Honorable Court must decide in determining whether your petitioner stands convicted of the violation of a statute which a person of his position could not violate. A flagrant injustice has resulted from this conviction and this injustice can only be cured by your Honorable Court in ruling that your petitioner not be denied his liberty as guaranteed by the 14th Amendment.

The case of *Cahoon vs. Smith*, 51 S. Ct. Rep. 582, 1931, unequivocally states that position of law which invalidates the statute now before your Honorable Court. Your court therein held that:

"The legislature could not impose upon laymen,

> at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulations as to which even courts are not yet in accord." (Underscoring ours)

The Supreme Court of Idaho is in accord with the principle of the law that "charged with" means charged by law. In the case of *Ex Parte Huston*, 147 Pac. 1064, the Court said:

> "* * * In order to warrant a conviction under the statute it must be found that the defendant officer is in the language of the statute, 'charged with the receipt, etc. of public money, is charged by law'."

This definition of "charged with" has also been found in the case of *State vs. Meyers*, 56 Ohio State 340, *State vs. Bolin*, 110 Mo. 209, *State of Nebraska vs. Harry Boatman*, 7 N. W. 2d 159, and *People vs. Knott*, District Court of Appeals, Third District of California, 94 Pacific 2d 635.

An early Pennsylvania federal case is authority for the proposition that a servant or agent cannot be guilty under an embezzlement statute because he is not charged by law with the collection of public money. *U. S. vs. Randall Hutchinson*, 4 Clark 365.

The vice of vagueness as presented by the Pennsylvania statute is incurable here, for a court in ascertaining which individual is encompassed by the act, cannot use any standard prescribed by the statute, for there is none; but must guess as to its meaning, and for a court to resolve the guilt or innocence of an individual under the uncertain and vague terms of a statute is to deprive an individual of his liberty as guaranteed under the Constitution of the United States as stated in the 14th Amendment, and this deprivation of liberty is without due process of law.

Your Honorable Court in the case of *Connally, Commissioner of Labor of Oklahoma vs. General Construc-*

tion Company, 46 S. Ct. Rep. 126, 1926, expressed the doctrine behind the due process clause of the 14th Amendment which is applicable to the statute here in question. Your Honorable Court stated:

> "* * * Nor can the question be solved by resort to the established canons of construction that enables a court to look through awkward or clumsy expression, or language waning in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant on thing rather than another. * * *"

Your Honorable Court held in *Cline vs. Frink Dairy Co.*, 274 U. S. 445, 1927:

> "* * * It will not do to hold an average man to the peril of an indictment for the unwise exercise of his knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result."

A state statute cannot leave an individual to guess at his peril whether he can or cannot be constitutionally punished for violation of the statute. All are entitled to be informed as to what the state commands or forbids, and the most important function in the requirement of definition of a criminal statute is to give notice to the individual if he is encompassed by the statute that the law, as thus construed by the Supreme Court of Pennsylvania, licenses that court and all other lower courts to create its own standards in each case. Such a statute injects into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically—responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy of the statute itself and to result in a significant number of impermissible public verus private

intent resolutions which are beyond the effective discovery or appraisal of the court.

It is the cardinal aim of the due process clause of the 14th Amendment of the United States Constitution to minimize the frequency and gravity of those occasions in which indefiniteness is a creature of a statute.

2. Whether the admission into evidence of your petitioner's financial transactions constituted a denial of due process of law in that such evidence bore no competency nor relevancy nor materiality to the issues involved but only served to prejudice the rights of your petitioner as to receiving a fair trial.

The constitutional guaranty of due process requires from all courts a strict adherence to the adopted and recognized rules of evidence in all civil and criminal trials. *People vs. Schriber*, 162 Pac. 2d 498. Due process requires that a person accused of a crime must be given a fair trial and that evidence which merely serves a prejudicial purpose and is not competent denies him of this right. Due process is deemed denied as to the admission of irrelevant, immaterial and incompetent evidence. *Commonwealth vs. Turner*, 371 Pa. 417.

The lower court erred in permitting the Commonwealth, over objection, to prove the bank deposits made by your petitioner during the indictment years, the purchase of automobiles during said periods and the purchase of a home after the end of the indictment period.

These financial transactions of your petitioner bore no relevancy nor pertinency to the issues herein involved. The Commonwealth introduced no evidence of any sudden acquisition of wealth which might have made the evidence admissible. The record is completely devoid of any evidence on this important issue. The Commonwealth also failed to earmark any of the bank deposits by connecting the same to any moneys allegedly embezzled by size of deposit, amount etc. This case is deemed to be

ruled by a decision of your Honorable Court where Mr. Justice Harlan in the case of *Williams vs. United States*, 168 U. S. 382, 18 S. Ct. Rep. 92, said:

> "* * * Taking the case to be as presented by the bill of exceptions, the utmost the evidence tended to show was that the accused had in his possession at different times certain sums that were deposited by him in bank to his credit or to the credit of his wife. It is to be observed that no sum so deposited corresponded in amount with the sums which he was charged with having extorted under color of his office as Chinese inspector. Upon the face of the transactions referred to, there was no necessary connection between the deposits and the specific charges against the defendant. And yet the jury were in effect told that the failure of the accused to explain how he came by those sums, aggregating nearly $5,000, was a circumstance tending to show that if he had given that explanation it would have operated to his prejudice in meeting the particular charges against him, of extorting at one time $100, and at another $85, under color of his office. There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have ogtained by honest methods, and therefore he must be guilty of extorting the two sums in question. The present case does not come within the rule of evidence referred to by the learned court. The jury may have been unable to say from the evidence where

APPENDIX A

No. 284 COMMONWEALTH OF PENNSYLVANIA vs. FRANK JOSEPH BURNS, *Appellant*	In the Superior Court of Penna. Nos. 26 to 38 inc. April Term, 1962

Appeals from the Judgment of the Court of Quarter Sessions of Cambria County at Nos. D-73, D-72, D-71, D-70, D-69, D-68, D-67, D-65, D-64, D-61, D-59, D-58 and D-57 September Sessions, 1960, respectively.

OPINION OF THE COURT

(Filed June 12, 1962)

By ERVIN, *Judge*

The appellant, Frank Joseph Burns, was convicted by a jury under 13 bills of indictment, each charging the crime of embezzlement under §822 of the Act of June 24, 1939, P. L. 872, 18 PS §4822, which reads as follows:

> "Whoever, being an officer, employee or agent of this Commonwealth, or political subdivision thereof, charged with the collection, safekeeping, transfer or disbursement of public money, converts to his own use, in any way whatsoever, or uses by way of investment, in any kind of property or merchandise, any portion of the public money entrusted to him for collection, safekeeping, transfer or disbursement, or proves a defaulter, or fails to pay over the same when thereunto legally required by the person authorized to demand and receive the same, or aids or abets or is an accessory to any such act, is guilty of embezzlement, a felony. . . ."

Defendant had been superintendent of the Cambria County Home for the Aged for many years prior to and including the years 1957, 1958 and 1959, which were the

years covered by the 13 indictments. It was the policy of the county to require such patients at the County Home as were financially able to reimburse the county either in whole or in part for the cost of their care and maintenance. According to the testimony of one of the county commissioners it was defendant's duty, as superintendent, to investigate whether patients were able to pay and if so, how much. He was to determine ability to pay, to make a charge accordingly, and he had also been given authority to collect these support payments from the patients and turn them in to the office of the county treasurer, who was likewise the treasurer of the Cambria County Institution District under which the County Home operated. The Commonwealth proved and defendant later admitted that during the three years covered by the bills of indictment he collected for the use of the county from the 13 patients referred to in the 13 bills of indictment the sum of $9,560.00 and that of this sum he transmitted to the county treasurer the sum of $3,390.00, leaving the sum of $6,170.00 paid by the patients for the use of the county but not paid over by defendant to the county treasurer. Defendant took the witness stand, admitted having received the amount of money alleged by the Commonwealth and his failure to turn over $6,170.00 to the county treasurer. His defense was that he did not convert this sum of money to his own use although he admitted having deposited it in his personal checking account out of which he drew checks for his own purposes. He contended that he used none of the money collected from the patients for his own purposes but spent it for the benefit of the patients in purchasing for them extra clothing, tobacco, cigars, candy, etc., and for the use of the county for such items as disinfectants, mattresses, furniture, shrubbery, floor finishing, and many other items which the county otherwise would have been required to purchase out of other county funds.

Counsel for appellant first contends that he was not an officer or employe charged with the collection, safekeeping, transfer or disbursement of public money and

that the judgment of conviction should have been arrested. While §822 uses the language "charged with" it is important to note that the words "by law" are not contained anywhere in the section. The evidence clearly reveals that the county commissioners had charged Burns, as superintendent of the County Home, with the collection of the support payments from the patients and had directed him to turn it over to the county treasurer. When collected from the patients the money became public money.

Certain courts take the position that statutes providing for the collection of public money are penal and therefore should be strictly construed. Other courts have emphasized the necessity of construing such statutes broadly enough to serve the public purpose of protecting the public interest. In this connection we repeat with approval what was so well said by President Judge GEORGE W. GRIFFITH for the court below: "The first position is exemplified by the case of *State of Nebraska vs. Boatman*, 7 N. W. 2d, 159, wherein the court said that a deputy or a clerk in the County Treasurer's office may not be prosecuted under the statute prohibiting the embezzlement of public moneys because he was not 'charged by law' with the duty of collecting and disbursing such moneys. This court was of the opinion that only such persons who were designated by a statute to have charge of public moneys were amenable to prosecution. In its opinion, the court called attention to the fact that the State of Ohio had a similar statute and in the case of *State vs. Myers*, 47 N. E. 138, its courts came to a similar conclusion. Defendant also calls our attention to Ex Parte Huston, 147 Pac. 1064, and *State vs. Bolin*, 110 Mo. 209, 19 S. W. 650. In the latter case, however, the defendant was neither charged by statute nor by any appointing power to collect the public moneys but obtained possession thereof by falsely representing that he had such right.

"On the other hand, the point of view of these courts

which find that it is not necessary that a defendant charged with the embezzlement of public funds be so charged by statute was expressed by the Supreme Court of Indiana in the case of *Kops vs. State*, 42 N. E. 2d, 58, as follows: 'It would be unthinkable to hold that only officers charged *by law* with the collection, safekeeping, transfer, etc., could be guilty of embezzling public funds.' (Emphasis supplied)

"Also in *State vs. Clerkin*, 58 Conn. 98, 19 A. 517, the court held that such a statute was applicable to one employed by the selectmen of a town although the office which he held was not specifically authorized to collect public moneys by statute. Likewise in *People vs. Lester*, 21 Cal. App. 2d, 450, 68 P. 2d, 467, the court found that a deputy city clerk duly appointed by the commissioner of finance to act as a license clerk and collector was 'at least a de facto officer, and so to be within the terms of the statute.' In *State vs. Exnicios*, 33 La. Ann. 253, it was held that a clerk employed by the administrator of finance of the City of New Orleans was within the purview of a statute providing for the punishment of 'any officer or other person charged, with the collection, receipt, etc. of public money.'

"The general rule is set forth in 18 Am. Jur. 596; Embezzlement, Sec. 40, as follows: 'In order to authorize the conviction of a public officer for embezzlement, it must usually be shown: (1) That the accused is a public officer or occupies a fiduciary relation; (2) that the money or property which he is charged with appropriating to his own use came into his possession by virtue of his office or employment; and (3) that he embezzled or fraudulently converted it to his own use.'

"These three requisities are present here.

"a. Under our criminal statute an accused need not be a public officer because employees are specifically mentioned in the statute. Moreover, defendant occupied a fiduciary relation in that he collected

county moneys from patients for the purpose of transmitting the same to the County Treasurer.

"b. There can be no question that the money which he was charged with appropriating to his own use came into his possession by virtue of his office or employment.

"c. The Commonwealth produced ample testimony that he embezzled or fraudulently converted such money to his own use."

"In the case of *Springer vs. State*, 196 N. E. 97, the Supreme Court of Indiana sustained the conviction of the Superintendent of the County Hospital on a charge of embezzling money paid by the patients for board. Defendant in that case had been appointed Superintendent of the County Hospital by a Board of Trustees who in turn had been appointed by the County Commissioners. The court held that defendant was a person charged and entrusted with the collection and safekeeping of the payments for board made by the patients although not specifically given such authority by statute.

"In *Com. vs. Smith*, 116 Pa. Super. Ct. 134, 143, a school board appointed the defendant to collect delinquent taxes. Defendant was prosecuted for embezzlement under the Act of June 12, 1878, P. L. 196. The court said that that the absence of statutory authority in the school board to appoint defendant as its agent was not a defense to the charge of having embezzled the money received as such agent. In this case, as in the one before us, the defendant was not charged by statute with the collection of public moneys but he was charged with their collection by the authority which appointed him; in that case the school board, in this case, the County Commissioners.

"Although defendant's office of Superintendent of the Cambria County Home was not specifically charged by statute with the collection of public money, we are satisfied that he was so charged by virtue of his designa-

tion to collect such money by the action of the County Commissioners."

Appellant's counsel next argues that there was no evidence that the appellant had embezzled by converting to his own use public moneys. Burns took the stand in his own defense and frankly admitted that during the three years involved, 1957, 1958 and 1959, he had collected for the use of the county from the 13 patients referred to in the 13 bills of indictment the sum of $9,560.00 and that of this sum he transferred to the county treasurer the sum of $3,390.00, leaving the sum of $6,170.00 not paid over by the defendant to the county treasurer. His defense was that he did not convert this sum of money to his own use but had expended it for the benefit of the patients and the county as hereinbefore indicated. The Commonwealth proved that during the three years involved Burns had deposited in a bank account the sum of $45,689.70. In October 1959 there was no balance in this account, it having been closed out. The Commonwealth also proved that during the three years involved Burns and his wife had deposited in a savings account the sum of $4,686.50. On January 1, 1957 this savings account had a balance in it of $15,213.43. On December 1, 1959 the balance in this account was $21,008.81. Burns produced cancelled checks and receipted bills to show that during the three years involved he had spent the sum of $24,035.74 for the benefit of the patients and the county and that these sums had come out of a tin box where he kept some of the patients' cash and out of the above mentioned checking account.

Burns also testified that the only people from whom he withheld money for room and board were the ones for whom indictments were charged. It must be recalled that Burns was charged only with embezzlement of the sum of $6,170.00 in the 13 indictments upon which he was convicted. When it was pointed out to him in cross-examination that he had spent approximately $24,000.00 to cover approximately $6,000.00 of shortage, his explanation was: "You must remember that these contributions were not

entirely confined to 1957 but they would go back into previous years. Q. Are you now saying that you had a reserve at the beginning of 1957 of approximately $15,000.00? A. I had a running reserve, if you'd call it such. Q. How much was this running reserve? A. That I could not tell you."

Burns also frankly admitted that he deposited in the above mentioned checking account his own money and paid his own personal bills therefrom. He could not tell how much of his own money he had deposited in the checking account nor how much he had used for the payment of his own bills. He also admitted that he operated a canteen at the County Home and that some of the purchases covered by the above mentioned checks and cash receipts were for the canteen. He also said that some of the canteen money was deposited in the checking account but he could not tell the jury how much. The canteen operation was not reported to the county nor was it subject to audit by the county controller. How much of the purchases went into the canteen and how much went to the patients free of charge he was unable to tell. The evidence revealed that Burns had had a black ledger in which he kept the accounts of these patients. When he was asked to produce it, he said it was missing and he did not know where it was. If this black ledger had been produced it might have provided some of the answers to the above questions. It must have been extremely difficult for the jury to believe that this man would expend approximately $24,000.00 when he had from the patients approximately $6,000.00.

Burns also testified that there were many more patients who had received checks from private pensions, social security, blind pensions, etc. than the 13 people involved in these indictments. He admitted that for the years previous to 1957 he collected money from other patients than those involved in these 13 indictments and that he had a running reserve of these moneys. He did not know how much was in that reserve. He admitted

that he once had records showing how much had been collected from each patient but he did not know where those records were at the time of trial. We think that the jury could properly infer that Burns had collected from many other patients than those involved in these 13 indictments.

Appellant's entire defense rests largely upon his own story and therefore his credibility is involved. We quote with approval what was said by President Judge RHODES in *Com. vs. Kauffman*, 190 Pa. Superior Ct. 444, 453, 154 A. 2d 269: "Where the issue is merely one of credibility we ordinarily do not disturb the determination made by the trier of fact. If such were this case, the conviction might be sustained on the basis of the evidence that defendant had received funds on behalf of the company which he failed to remit and which he admitted depositing to his own account."

The admission by Burns that he had collected the the moneys as charged by the Commonwealth; that he did not turn in the money to the county; that he had commingled it in his own checking account with his own funds; that he paid out of this checking account his own bills as well as bills for the patients and county, should alone be sufficient to sustain the conviction of Burns on these 13 indictments. There were many other circumstances proved to buttress this conviction. Some of these circumstances are the fact that Burns by his own admission did not inform anyone, including the proper county authorities, of any expenditures allegedly made for the patients or for the county, the first knowledge of which came at the trial, nine months after the formal charges had been filed; the fact that purchases which appellant claimed were made for county purposes were, in many instances, discovered to have been made for canteen purposes, no account of this operation having been made; the fact that many of the purchases which he says were made could have been made out of available budgetary allocations for such purposes by the institution district;

the fact that Burns during the three years involved had deposited in the bank account $45,689.70 and in the savings account $4,686.50, making a total of $50,376.20, whereas during the same three-year period the net take home pay of himself and wife was $14,513.01; that during the same three-year period Burns had deposited in another savings account in the Johnstown Savings Bank the sum of $5,477.00; that during the same three-year period he had purchased a Lincoln automobile, two Cadillacs and a Thunderbird; that during the same three-year period he had purchased stock worth $3,746.04 and paid for it out of the patients' checking account; that within two months subsequent to the last indictment he and his wife had purchased a home for which they paid the sum of $25,000.00 in cash; that he knew that it was the county's money and that he should return it to the county because he actually did return to the county some of the money collected; and that he admitted that it was irregular for him to do what he had done. His explanation that he did this to favor certain merchants and to speed up purchases was rather weak. It is our opinion that there was ample evidence to sustain the convictions.

Appellant's attorney next contends that it was error for the court below to admit evidence of appellant's financial transactions during the indictment years. He relies heavily upon *Williams vs. United States*, 168 U. S. 382, 18 S. Ct. 92. In *United States vs. Jackskion*, 102 F. ed 683, 684, 123 A. L. R. 116, 118, Judge PATTERSON, speaking for the Second Circuit Court of Appeals, said: "Jackskion urges that it was reversible error to admit evidence of his bank account, citing *Williams vs. United States*, 168 U. S. 382, 18 S. Ct. 92, 42 L. Ed. 509. It is the general view that where a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced. *Commonwealth vs. Mulrey*, 170 Mass. 103, 49 N.E. 91; *Commonwealth vs. Coyne*, 228 Mass. 269, 117 N.E. 337, 3 A. L. R. 1209; *People vs. Connolly*, 253 N. Y. 330, 171

N. E. 393; *Campanelli vs. United States*, 9 Cir., 13 F. 2d 750; *O'Shea vs. United States*, 6 Cir., 93 F. 2d 169; *Wigmore on Evidence*, section 154; *Wharton's Criminal Evidence*, section 194. As pointed out by Mr. Justice Holmes in *Commonwealth vs. Mulrey*, supra, such evidence may, when taken with proof of other facts, have a logical tendency to prove criminal misconduct. The weight will of course vary, depending among other things on whether the money was kept secretively by the accused. See *People vs. Connolly*, supra; *O'Shea vs. United States*, supra. In *Williams vs. United States*, supra, relied on by the appellant, the defendant was on trial for having extorted specific sums, $100 in one case and $85 in the other, from Chinese under color of his office, as Chinese inspector. Evidence that he had deposited between $4,000 and $5,000 in his bank account in the year when the offenses were said to have been committed was held inadmissible. The discussion in the Williams case, however, shows that no general rule of evidence was laid down. The case is to be taken, we think, as no more than a ruling on the particular facts there presented. It was so treated by the Sixth Circuit in *O'Shea vs. United States*, supra. We are therefore of opinion that the District Court was right in permitting the prosecution to show that Jackskion's bank balance, normally at an amount between $500 and $1,000, had in a year climbed to more than $8,000." In this connection it should be recalled that Burns admitted that he had made the collections as alleged by the Commonwealth and had failed to turn them over and had commingled them with his own money and that he had paid his own bills out of this account.

Appellant's counsel also objected to that part of the district attorney's argument to the jury to the effect that the money embezzled was the jurors' own money. The court below immediately advised the jury that it was not a proper argument for the district attorney to make and cautioned the jury not to be influenced in the slightest degree by the remark. Burns admitted that he had collected the money for the county and admitted that it

belonged to the county. We do not believe, under these circumstances, that the remark could have had prejudicial effect upon the jurors. The jurors certainly must have understood that money which belonged to the county was actually taxpayers' money. We must give jurors credit for having some intelligence. Such a remark would be reversible error only where, under all the circumstances, it appears to have generated prejudice actually affecting the verdict. Where the court promptly takes effective action to remove any improper consequences of such an argument it is not reversible error: *Com. vs. Crittenton*, 326 Pa. 25, 31, 191 A. 358, 361; *Com. vs. Capps*, 382 Pa. 72, 114 A. 2d 338; *Com. vs. McHugh*, 187 Pa. S. Ct. 568, 577, 145 A. 2d 896.

Appellant's counsel also complains of the fact that the court below did not submit to the jury the issue of the claim of right by the defendant to do what he did in this case and that the court below did not charge the jury as to the criminal intent necessary for a conviction. This is not a case like *Commonwealth vs. Kauffman*, supra, where the evidence indicated that the defendant, as manager of a corporation, had the power to collect money for the corporation and to expend it in behalf of the corporation. Burns, in the present case, by paying some of the money to the county, indicated that he knew that all of it should have been paid to the county. He also expressly admitted he knew what he was doing was irregular. Furthermore, he admitted that he did not inform the county as to what he was doing. There was no evidence in the present case to indicate that the county had ever given him the authority to do what he did and he himself admitted that he withheld the money from the county and paid some of the bills himself "in order to prefer certain venders" instead of paying it to the county and thus permitting the county commissioners to select the vendors. His real defense was not that he had a right to do what he did but that he did not embezzle the money but used it for county purposes. The court below very carefully charged the jury in such a way as to show what the real issue was.

The court charged that, in order to convict, the jury "must find that he fraudulently converted such money to his own use" and told the jury that the defendant denied that he had done so. Later in the charge, the trial judge said: "In determining whether the defendant did fraudulently, and with criminal intent, which you are required to find, convert the county's money to his own use. . . ." After reviewing defendant's contention that he had spent the money he had collected for the county for the benefit of the patients or the county, the trial judge said: "But he says that he didn't embezzle, that is he didn't convert to his own use with criminal intent, any of the funds; and if he didn't, Members of the Jury, he should be found not guilty." Under the charge of the court below there could have been no misapprehension possible on the part of the jury that it could convict if it found that defendant acted under a bona fide belief that he had a right to withhold money from the county and spend it as he did because the court below specifically told the jury that the defendant could not be convicted unless they found that he converted the county money to his own use with criminal intent and fraudulently. Non-disclosure by one accused of embezzlement is evidence of his intent. If it appears that the accused did not confess to taking money until he was found out and charged therewith, an intent to embezzle will be inferred: 18 Am. Jur. 584, Embezzlement, §24; *Agnew vs. United States*, 165 U.S. 36, 17 S. Ct. 235.

The judgments of sentence are affirmed and the defendant is directed to appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with the sentence, or any part of it which had not been performed at the time the appeal was made a supersedeas.

APPENDIX B

Title 18 Purdon's Penna. Statutes Annotated (Crimes and Offenses) § 4822 Embezzlement by public officers:

Whoever, being an officer, employe or agent of this Commonwealth, or political subdivision thereof, charged with the collection, safekeeping, transfer or disbursement of public money, converts to his own use, in any way whatsoever, or uses by way of investment, in any kind of property or merchandise, any portion of the public money intrusted to him for collection, safekeeping, transfer or disbursement, or proves a defaulter, or fails to pay over the same when thereunto legally required by the person authorized to demand and receive the same, or aids or abets or is an accessory to any such act, is guilty of embezzlement, a felony, and upon conviction thereof, shall be sentenced to undergo imprisonment, by separate or solitary confinement, at labor, not exceeding ten (10) years, or to pay a fine not exceeding the amount of the money embezzled, or both. 1939, June 24, P. L. 872 § 822.

FILED
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JOHN F. DA

IN THE

Supreme Court Of The United States

October Term, 1962

No. 531

COMMONWEALTH OF PENNSYLVANIA

vs.

FRANK JOSEPH BURNS,
Petitioner

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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ANNOTATIONS

144 ALR 585	4

COUNTER-STATEMENT OF THE CASE

The facts of this case are accurately set forth in the opinion of the Superior Court of Pennsylvania. It is important to note that contrary to the statement of the petitioner, the petitioner did not use the money withheld from Cambria County on behalf of the patients at the Cambria County Home, but rather applied it for his own benefit. This is shown by the following:

(1) Petitioner, by records produced and by his own admission, withheld public funds from the County Treasurer;

(2) Petitioner, by his own admission and testimony of others, did not advise the proper authorities of the county that funds were so withheld;

(3) Petitioner deposited these funds in his own personal checking account;

(4) Petitioner was unable to provide any accounting as to what deposits in this account were his personal deposits and what deposits constituted funds withheld from the county;

(5) Records and receipts, last in the possession of the petitioner, were incomplete and missing at the time of trial;

(6) Petitioner, by his own admission, did not inform anyone, including the proper county authorities, of any expenditures allegedly made for the inmates of the institution. The first knowledge of such action came at trial, nine months after the formal charges had been filed;

(7) Checks which petitioner alleges were issued in payment for inmate care and services were so designated solely by the testimony of the petitioner. Corroborating evidence was to a large extent limited in nature;

(8) Purchases which petitioner claimed were for county purposes were, in many instances, discovered to have been made for Canteen purposes. Inmates, visitors and employes utilized the services of the Canteen and paid for products obtained. No accounting of this operation was obtainable from the petitioner;

(9) Petitioner claimed certain purchases were made for county purposes despite available budgetary allocations for such purchases;

(10) During the period of the indictments, petitioner deposited approximately $50,000.00 in two personal accounts in two local banks;

(11) During the period of the indictments, petitioner deposited $5,447.00 in a savings account in the Johnstown Savings Bank;

(12) During the period of the indictments, petitioner purchased a Lincoln, two Cadillacs and a Thunderbird;

(13) During the period of the indictments, petitioner made stock investments totalling $3,746.04 and within two months subsequent to the last date of indictment, purchased a home for $25,000.00 in cash; and

(14) During the period of indictments, the combined take-home pay of the petitioner and his wife was $14,513.01.

The contention that Section 822 of the Act of June 24, 1939, P.L. 872, 18 P.S. 4822, which states,

> "Whoever, being an officer, employe or agent of this Commonwealth, or political subdivion thereof, charged with the collection, safekeeping, transfer or disbursement of public money, converts to his own use, in any way whatsoever, or uses by way of investment, in any kind of property or merchandise,

> any portion of the public money entrusted to him for collection, safekeeping, transfer or disbursement, or proves a defaulter, or fails to pay over the same when thereunto legally required by the person authorized to demand and receive the same, or aids or abets or is an accessory to any such act, is guilty of embezzlement, a felony, and upon conviction thereof, shall be sentenced to undergo imprisonment, by separate or solitary confinement, at labor, not exceeding ten (10) years, or to pay a fine not exceeding the amount of the money embezzled, or both,"

is unconstitutional as being in violation of the 14th Amendment because of vagueness and uncertainty was not raised at any time in the courts below and is being presented for the first time to your Honorable Court.

> Where it does not appear from the record that a constitutional question was presented or passed upon by the Supreme Court of the State and it is sought to raise this question for the first time by assignments of error in this court, it is necessarily excluded from consideration. *White River Lumber Co. vs. Arkansas*, 279 U. S. 692, 700, 49 Sup. Ct. 457, 460.

Furthermore, it cannot be seriously contended that the embezzlement statute is vague and indefinite. The Act applies to any employe of a political subdivision of the Commonwealth of Pennsylvania charged with the collection of public money and who converts it to his own use.

Petitioner Burns was an employe of a political subdivision of the Commonwealth of Pennsylvania, Cambria County, and the evidence clearly showed that he, as Superintendent of the Cambria County Home, was directed by the Commissioners of the county to collect support payments from the patients and to turn them over to the County Treasurer. The Superior

Court's interpretation of the statute is a logical one. The other statutes referred to in petitioner's brief concern embezzlement statutes much narrower in scope than the Pennsylvania Act which applies to employes or agents. Further, as shown by the Annotation found in 144 ALR 585, the majority of jurisdictions would interpret these more limited Acts to apply to petitioner.

Admission of petitioner's financial transactions was relevant and material. An essential element of the offense charged was the conversion of funds "to his own use."

Having established petitioner's obligation to collect funds, and his actual receipt of funds, it then became germane to show the disposition (or conversion) of the same.

It was imperative that financial transactions be admitted into evidence in order to establish the conversion of the public funds.

The mere commingling of public funds with personal funds would have constituted a conversion within the meaning of the Act.

This cause is distinguished from *Williams vs. United States*, 168 U. S. 382, 18 S. Ct. Rep. 92.

It may be distinguished in the following manner:

(a) the wide disparity between petitioner's assets and financial transactions;

(b) the relationship or chain of continuity brought about by the evidence that patients' checks were cashed in large volume—and similar deposits of cash items in large amounts in petitioner's personal account; and,

(c) the subsequent defense and admission by petitioner that public funds were deposited in his own personal account—but allegedly used for public purpose.

CONCLUSION

For the reasons set forth above, we respectfully submit that this petition for a writ of certiorari should be dismissed.

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of Cambria County

W. LOUIS COPPERSMITH
Assistant District Attorney
of Cambria County

CERTIFICATE OF SERVICE

I certify that I have served by mail upon Arnold D. Smorto, Esquire, and Vincent M. Casey, Esquire, Attorneys for the Petitioner, five copies of the foregoing Answer to Petition for Writ of Certiorari.

FERDINAND F. BIONAZ
District Attorney
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Pennsylvania